IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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ORDER

Dr. Bansilal Jakhar
Vs.
The State of Rajasthan & Anr.

S.B. CIVIL WRIT PETITION NO.6754/2003 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 20th November, 2006

PRESENT

REPORTABLE

HON'BLE JUSTICE SHRI MOHAMMAD RAFIQ

Mr.N.R. Choudhary, Advocate, for the petitioner.
Mr.Tarun Joshi, Advocate, for the respondents.

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BY THE COURT:

This writ petition has been filed by petitioner Dr. Bansilal Jakhar seeking relaxation in the outer age limit for appointment on the post of Head Master, Secondary School. He was initially appointed as Teacher Grade-III vide order dated 14th Sept., 1985. Later however he accepted the appointment as primary teacher in Kandriya Vidhayalaya, Uttarlai, Barmer on

10.12.1986 where he was promoted as teacher grade-II (TGT) and worked upto 28th Nov., 1994. The petitioner then again came back in the employment of the respondent as Lecturer of the School Education as Political Science vide order dated 29.1.1994.

The Rajasthan Public Service Commission issued an advertisement in some time in April, 2002 inviting thereby applications for 25 posts of Head Masters, Secondary School. The petitioner also applied pursuant to the said advertisement. The case of the petitioner is that he was eligible for such appointment as per Rule 11 of the Rajasthan Education Service Rules, 1970 (in short the Rules of 1970). As per the provisions contained in regard to said post in Column 4 of Group F in the schedule appended to the Rules of 1970, a candidate should have Bachelor's Degree or Diploma in Education along with the five years experience of teaching of High/Junior HSS/Higher Secondary Classes or the alternative qualification mentioned in the said column. The petitioner possess requisite qualification and experience for the post of Head Master. He obtained three

years Bachelor's Degree in Arts in the year 1982 thereafter he also obtained the degree of B.Ed. in the year 1985 both from Rajasthan University, Jaipur and then he obtained the degree of M.A. in political science in the year 1984 and obtained Ph.D in the year 1992.

The written test was conducted on 22.2.2003. The petitioner also appeared in the said test and was declared successful. While result was declared on 1.9.2003, the interviews were held on 10.12.2003. However, the RPSC by their communication dated 16.11.203 informed the petitioner that his candidature has been rejected on account of his being found over age. This has been challenged by the petitioner on the ground that according to the information booklet in para no.14D he is entitled for age relaxation of 15years being a member of Rajasthan Educational Service as such relaxation has been provided to the members of the Rajasthan Educational Subordinate Service Rules of 1971 (in short the Rules of 1971) also. In para no.14C of the information booklet, five years age relaxation has been provided to the government

servants of the Rajasthan. The last vacancy for appointment on the post of Head Master was notified in the year 1993-94 and such vacancies were again notified only in the year 2002, which is subject matter of present proceedings. While the rules provide for determination of the vacancies, yet the respondents failed to discharge their obligation in making such determination on yearwise basis. Had the vacancies were determined regularly and notified yearwise the petitioner would have been eligible to secure appointment because he was within age limit upto the year 2000.

The petitioner has been made to suffer for no fault on his part but due to fault of the respondents. While the petitioner is presently drawing the salary in the pay scale of Rs.6500-200-10500 whereas the pay scale of Head Master is 7500-225-. Even if the post of School Lecturer is counted in the Rajasthan Education Service then also the petitioner becomes eligible for the selection on the post of Head Master. So far as appointment on the post of Head Master is concerned, the members of Rajasthan Education Service should fall in the

same class. However, the age relaxation has been provided to the member of Rajasthan Educational Service alone and no such age relaxation has been given to the members of Rajasthan Education Service. In doing so, the respondents have treated equals uneuqlly thereby discriminating against the petitioner and thus violating Article 14 and 16 of the Constitution of India. The petitioner has therefore prayed that the order Annex.1 by which respondents RPSC has rejected the candidature of the petitioner should be declared illegal and should be quashed and set aside and the respondents may be directed to provide him relaxation of 15 years in the outer age limit. In the alternative, a prayer has been made that the respondents may be directed to provide age relaxation to the petitioner for which vacancies were not determined and not notified on year to year basis and be further directed to consider the petitioner eligible for appointment on the post of Head Master in the selection held pursuant to advertisement Annex. 1 and consider his case for appointment on the said post with effect from the date persons junior to him were appointed in the merit with all consequential benefits.

The respondents have contested the writ petition and filed reply thereto. Their stand in the reply is that since the petitioner was holding the post of Lecturer in School Education which is a post falling within the Rajasthan Education Service Rules, 1970, he is not entitled to claim benefit of age relaxation of 15 years available to the members of Rajasthan Educational Subordinate Service under the Rules of 1971. The eligibility conditions in the advertisement have been reflected as per the rules according to which a candidate should have attained minimum 25 years of age and should not have completed 33 years of age as on 1st July, 2002. Relaxation in age has been provided to various categories of persons. According to such relaxation, an employee of the State Government is entitled to 5 years' age relaxation whereas a candidate working in the Rajasthan Educational Subordinate Service, which is governed by the rules of 1971 is entitled to age relaxation of 15 years. The petitioner who belongs to Rajasthan Education Service is not entitled to claim parity with those who are members of Rajasthan Educational Subordinate Service therefore he is not entitled to claim age relaxation upto 15 years. There is no

provision in the Rajasthan Educational Service Rules providing age relaxation to the candidates merely on account of fact that recruitment was not held on regular basis in a particular year on account of delayed determination of vacancies. Since the petitioner was over age by one year eight months and nineteen days as on 1st July, 2002, his candidature had rightly rejected by the RPSC.

In addition to the arguments narrated above, Shri N.R. Choudhary, learned counsel for the petitioner submitted that there was no basis for not giving the benefit of relaxation of 15 years to the petitioner who is a member of Rajasthan Education Service Rules which is governed by the Rules of 1971. It has been argued that the post of Lecturer School Education is included at S.No.1 of Section F of the Schedule appended to the Rules of 1971. The petitioner therefore is entitled to age relaxation and the respondents have illegally rejected his candidature. In the alternative, it has been argued that even if the post of Lecturer School Education falls under the Rules of 1971 there was no rational basis for denying the

benefit of age relaxation to the members of Rajasthan Education Service while at the same time extending the same to the members of the Rajasthan Education Subordinate Service. Learned counsel for the petitioner argued that everyone serving in the government had a right to crave and endevour for advancement in life and secure better avenues in service. Vacancies for the post of Head Master were last notified in they year 1994-95 and they have now been advertised again only after lapse of 8 years in the year 2002. Had the vacancies been timely determined and notified yearwise, the petitioner would have been within the age limit upto 13.1.2000 and in view of his academic record, there was no reason that he would not have been selected. It has been argued that the restriction of providing age relaxation of 15 years to only members of Subordinate Service based on proviso (V) to the Rule 10 of the Rules of 1970 is wholly un-reasonable and arbitrary. The phraseology "the post in service" occurring in the said proviso would mean that any post in service. Admittedly,the petitioner is also holding the post of Lecturer School Education beside being a member of OBC

category. Thus he is entitled to age relaxation of 5 years as per the condition no.2 of the advertisement. The condition no.7 of the advertisement further provides that employees should be at the minimum age of 40 years. The petitioner being an employee of the State Government is entitled to apply utpo the age of 40 years and with the age relaxation of 5 years as admissible to the members of OBC as provided to him, he would be within the age limit upto the age of 45 years. Learned counsel for the petitioner has relied upon the judgment of this court in Prakash chand etc. Vs. State of Raj. & Anr 1990(2) RLR 1 and in Hardayal Singh Chahar Vs. State of Rajasthan & Ors 1998 WLC (UC) Raj 593. He therefor submits that the action of the respondents in denying age relaxation to the petitioner is therefore not only illegal but is also arbitrary, capricious, discriminatory and violative of Article 14 and 16 of the Constitution of India.

Shri Tarun Joshi, learned counsel for the respondent RPSC while opposing the writ petition has argued that the age relaxation of 15 years to the members of the Rajasthan

Education Subordinate Service Rules upto 15 years has been provided to only those who are members of the Rajasthan Education Subordinate Service. He therefore, prayed that the writ petition may be dismissed.

I have heard the arguments advanced by learned counsel for the parties and perused the record.

Although the learned counsel for the petitioner has made elaborate arguments questioning the wisdom of rule making authority in providing relaxation of 15 years to those who are members of Rajasthan Education Subordinate Service and at the same time denying such relaxation to those who are members of Rajasthan Educational Service but all those arguments have been made in the absence of any challenge to the vires or constitutional validity of such rule. I cannot possibly examine the question as to why in the rules such relaxation has been provided to members of Subordinate Service and why not to the members of the State Service and declare the rule ultra vires of Article 14 and 16 of the

Constitution of India. Those arguments simply cannot be accepted because the petitioner has filed the present writ petition on his own choice and if he decided by choice not to challenge the validity of said rules, this Court cannot suo moto on its own embark upon examining validity of the rules. Although law relating to pleadings contained in Code of Civil Procedure may not be strictly applied to the practice and procedure of the writ proceedings but at the same time they can be certainly used for the purpose of analogy. One of the principles contained therein is that a defendant cannot be expected to meet a case and make pleadings and produce evidence on a question on which the plaintiff has neither pleaded as not set up a specific plea in his pleadings. In the absence of challenge to the validity of rules, the respondents case could not be expected to come out with the explanation giving a philosophy behind the proviso (V) to rule 10 of the Rules of 1970 which reflects the relaxation of 15 years only to the members of Subordinate Service and does not extend the same to those of State Service. In making his submissions on this aspect although learned counsel for the petitioner has

made elaborate arguments in this matter, but he did so with the handicap of not having challenged the validity of rules. Those arguments therefore cannot be accepted.

So far as argument of learned counsel for the petitioner that petitioner being a government servant is entitled to age relaxation upto 40 years and if further relaxation of five years' as a member of OBC is granted to him, he would be within the age upto 45 years is concerned, this argument cannot be accepted. Stand of the respondent on this aspect is quite justified because a candidate who seeks relaxation under various classes can be granted relaxation in only one of them where he is entitled to maximum period of age relaxation. It cannot be said that candidate if entitled to relaxation in more than one categories, say two or three categories, the period of relaxation admissible to him in all these categories would be added up to make him eligible for appointment on the basis of such age relaxation.

The reliance placed by the learned counsel for the

petitioner on the judgment of Hardalay Singh's case (supra) is wholly misconceived because that was a case in which this Court was called upon to interpret the words 'post in service'in proviso (V) to Rule 10 of the Rules of 1971. The petitioner in that case was appointed as Senior Teacher on temporary basis in Rajasthan Education Subordinate Service. The Rajasthan Public Service commission invited applications for appointment on the post of Head Master. Relaxation of 15 years was made available to members of Rajasthan Education Service. When the petitioner was selected he was required to submit the proof of the fact that he was member of Rajasthan Educational Subordinate Service in substantive capacity. The certificate produced by the petitioner in that case stated that the petitioner was working on temporary basis but his services were liable to be regularized in near future. The candidature of the petitioner was however rejected by the RPSC on the ground that he was not entitled to age relaxation and had become over age as relaxation was refused to him. According to the RPSC, for being a member of service appointment should have been made in substantive capacity. This court on

analysis of the law on the subject held that 'a post in the service' as occurring in proviso (V) of the rule 10 of the Rules of 1970 would mean any post in service and would also include even a person appointed temporarily on any post of service and therefore the petitioner was held entitled to age relaxation of 15 years. This judgment therefore does not provide any help to the petitioner.

Coming now to the second argument of learned counsel for the petitioner that as if the determination of the vacancies would have been made by the government on year to year basis and if the vacancies would have been notified timely, the petitioner would have come in the age limit as per the rules upto 30.10.2000. It has been pleaded that similar relaxation was provided by the RPSC in respect of Primary and Upper Primary Examination held in 2004. The candidates who were within the age limit as on 1.1.1999 were made eligible to take up examination because vacancies of teacher grade-III were last advertised in the year 1999. Copy of the advertisement dated 2nd June, 2004 whereby applications for appointment on

the post of Primary and Upper Primary Teacher were notified has been placed on record. Clause 6(a) of the said advertisement indicate that such a relaxation was provided only as a one time relaxation.

Some what similar issue came up for consideration before the Division Bench of this Court in Prakash Chand (supra) where the relaxation in age limit was sought on the ground of failure of competent authority in making yearwise determination of vacancies for direct recruitment as well as promotion with reference to the provisions of Rajasthan Police Subordinate Service Rules, 1989. The Division Bench on consideration of the entire case law on the subject in para no.22 of the judgment observed as under: -

> "22. Thus, under the Rules of 1962, for the posts included in the Rajasthan Administrative Service, Rajasthan Service, Rajasthan Accounts Service Rajasthan Cooperative Service, Rajasthan Employment Exchange Service, Rajasthan State Insurance Service, Rajasthan Commercial Taxes Service, Rajasthan Subordinate Devsthan Service, Rajasthan Subordinate Cooperative Service, R.T.S. Service, Rajasthan Commercial Taxes Subordinate Service, Rajasthan Food & Civil Supplies

Subordinate Service and the various posts under the Rajasthan Subordinate Service (Recruitment and other Service Conditions) Rules, 1960 as well as under the Rajasthan Judicial Service Rules, 1955, a candidate is not denied consideration for direct recruitment on the ground of age limitation if he was within the age limit in a year in which the examination was not held. These provisions contained in the rules of 1962 as well as the rules of 1955 are intended to protect the rights of the recruitment yearswise. The Rules of 1962 and the Rules of 155 give benefit of relaxation in upper age limit, if examination is not held in a particular year. Even this is not necessary that there must have existed vacancies in that particular year. If the competent authority makes determination of vacancies for direct recruitment quota on yearly basis an fill them up regularly in the year in which the vacancies occur, no such difficulty could arise. However, in practice we find that the Rajasthan Public Service Commission as well as other appointing authorities are having multifarious function to perform. The R.P.S.C. is required to make recruitment for over 50 services apart from consultative functions in the matter of framing of service rules and disciplinary actions in respect of the gazetted officers. It is more or less impossible for the R.P.S.C. to make regular selection yearwise. That leads to a situation where large number of eligible candidates are rendered ineligible on account of their having become over-age merely because in the particular year when they were eligible, recruitment is not made by the Competitive body or Commission or other authority. We do not find any justification as to why a provision like one contained in Rule 11B of 1962 Rules or Rule 10 of 1955 Rules has not been made in other Rules. This would have eliminated wholly unnecessary litigation of this nature."

The Division Bench finally held that eligibility of the candidates must be adjudged with reference to the year to which the vacancies relate and the candidates cannot be made to suffer because of non-determination of vacancies or failure of the competent authority to issue advertisement. It would be profitable to extract the final view taken by the Division Bench in para no.28 of the said judgment:

> "28. We are, therefore, of the considered opinion that as in the case of promotion quota, vacancies in direct recruitment quota must also be determined on yearly basis. We are also of the opinion that once direct recruitment vacancies are advertised, the process of selection must be completed on the basis of the Rules, which are in existence at the time of advertisement. Any amendment made subsequently shall not affect the eligibility of the candidates. So far as the age requirement is concerned, the eligibility of the candidates must be adjudged with reference to the year to which the vacancies relate and the candidates cannot be made to suffer because of non-determination of vacancies or failure of the competent authority to issue advertisement."

While in the present case not much has come on record that the vacancies pertained to which year because the State

Government has chosen not to file reply to the writ petition inspite of service upon it but number of vacancies indicate that they do not pertain to a single year and vacancies of different years clubbed. They accumulated just because the vacancies were not notified and selection were not held for as many as 8 years. There is no denial of the fact that petitioner was within the age limit upto 13.10.2000 when he attained the age of 40 years and if yearwise determination of vacancies would have been made and vacancies notified timely, admittedly the petitioner would have come within the age limit.

When the candidature of the petitioner was rejected, this court vide its order dated 15.12.2003 directed the respondents to provisionally allow him to take interview. In compliance of the said order he was subjected to interview. The result of the interview was summoned by the court vide its order dated 2nd Sept., 2005 which was produced on 28th August, 2006. On perusal of the result, it transpired that the petitioner had qualified the examination by securing 57 marks whereas the last candidate selected in OBC category secured only 53 marks.

In other words, the petitioner secured more marks than cut off marks in his category. The respondents themselves in making recruitment to the post of Primary and Upper Primary Teachers vide notification dated 2nd June, 2004 had provided for a one time relaxation to those who were within the age limit upto 1.1.1999 and rightly so because the recruitment to those posts also was not held for quite some time resulting in accumulation and eventual clubbing of the vacancies pertaining to various years. On this analogy, if the respondents could extend such benefit to those seeking appointment at the post of Primary and Upper Primary Teachers, there is no reason why similar treatment be not accorded to the petitioner. Moreover, the petitioner cannot be denied this benefit just because he happens to be already employed as a Lecturer in School Education. Everyone working at any level in service has the legitimate right to yearn for progress in life and therefore endevour for advancement in his service career. Law on this question has been settled by the Division Bench in Prakash Chand (supra). I am of the considered view that eligibility of a candidate must be adjudged with reference to year to which

the vacancies relate. Merely because the respondents failed to discharge their obligation in making yearwise determination of vacancies and notifying those vacancies in time when all those eligible candidates could apply and compete for appointment against such vacancies, the candidates who in course of time have become over age cannot be made to suffer.

This issue can be examined even from another angle that law in question that appointments in excess of the number of advertised vacancies cannot be made has by now become a settled proposition of law. Reference in this connection may be made to judgments of the Hon'ble Supreme Court in Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors (2005) 4 SCC 154, State of J&K Vs. Sanjeev Kumar 2005(4) SCC 148 and Prem Singh VS. Haryana SEB (1996) 4 SCC 319. This proposition of law as consistently propounded by Hon'ble Supreme Court if taken its logical conclusion, it would be evident that if the vacancies occurring subsequent to issue of advertisement are filled up on the basis of recruitment process already initiated much prior of their concurrence and

availability, this would amount to denying the opportunity to compete for appointment against such posts to the candidates who may have attained eligibility subsequent to the date of advertisement pursuant to which such recruitment process was initiated. Conversely, if the candidates were eligible and vacancies were available and yet the recruitment process was not timely held for no fault of such candidates, they can certainly have legitimate grievance to make if vacancies of the years when they were eligible are notified for being filled up at a belated stage.

For what has been discussed above, the present writ petition deserves to be allowed and is accordingly allowed. The respondents are directed to appoint the petitioner on the post of Head Master. Such appointment shall take effect from the date of appointment given to the candidate immediately below him in the merit of the category to which he belongs and the petitioner shall also be entitled to seniority and other consequent benefits except difference of salary on the basis of such date. Since the petitioner is already in service, he shall

not be entitled to any back wages although his salary shall be notionally arrived at and he would be entitled to benefits for increments etc with reference to his above referred date of appointment. Compliance of the judgment be made within a period of two months from the date of service/receipt of the copy of this judgment. The parties shall bear their own costs.

(MOHAMMAD RAFIQ),J.

c.p.goyal/-